

2005 DRAFTING REQUEST

Bill

Received: 12/17/2004

Received By: pgrant

Wanted: As time permits

Identical to LRB:

For: Mark Gottlieb (608) 267-2369

By/Representing: Ron Sklansky

This file may be shown to any legislator: NO

Drafter: pgrant

May Contact:

Addl. Drafters:

Subject: Education - MPS

Extra Copies: MJL

Submit via email: YES

Requester's email: Rep.Gottlieb@legis.state.wi.us

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Suspension of DPI rule regarding Milwaukee Parental Choice Program

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	pgrant 12/20/2004	wjackson 12/21/2004					
/1			pgreensl 12/21/2004		mbarman 12/21/2004 lemery 01/03/2005	mbarman 01/12/2005	

FE Sent For:

→ Not Needed

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1?	pgrant	11/17/12/21	12/21 PS	12/21 PS			

FE Sent For:

<END>

Report From Agency
FINAL REPORT
CLEARINGHOUSE RULE 04-069
CHAPTER PI 35
PRORATING UNDER THE MILWAUKEE PARENTAL CHOICE PROGRAM

Analysis by the Department of Public Instruction

Statutory authority: ss. 119.23 (2) (b) and (11) and 227.11 (2) (a), Stats.

Statute interpreted: s. 119.23 (2) (b), Stats.

Explanation of agency authority:

Section. 119.23 (2) (b), Stats., requires the department to establish a prorate method for the department to utilize when the number of eligible students applying for the program exceeds the statutory limit. Because the department is interpreting the provisions of this statute and administers/enforces the program governed by it, s. 227.11 (2) (a), Stats., gives the department general rule-making authority.

Section 119.23 (11), Stats., gives the department authority to promulgate rules to implement and administer the entire program.

Related statute or rule: None.

Plain language analysis:

Under s. 119.23 (2) (b), Stats., no more than 15% of Milwaukee Public School's (MPS) membership (approximately 15,000 students) may attend private schools under the MPCP. The department is required to prorate the number of spaces available at each participating private school if in any school year there are more spaces available than the maximum number of students allowed to participate in the program. The proposed rules will set forth the process by which the department would prorate student spaces in the MPCP giving preference to continuing pupils in the choice program and siblings of continuing pupils.

The rules changed the current admission process by separating it into three parts. The approximate timeline for the process is as follows:

- February through March and, at the private school's option, August through September, a private school must determine a pupil's eligibility to participate in the program.
- Within 14 days of the parents request, but no later than April 5 and, if applicable, October 5, the private school must: (1) notify the parent whether or not the pupil is eligible for the program, and (2) submit to the department a copy of the pupil's application approved by the private school.
- DPI conducts a random selection from the pool of pupils reported by participating schools as eligible to participate.
- May 1- 20 and, if applicable November 1-20, a private school must accept or place on the school's waiting list, choice program pupils notified by the department that they may apply to participate in the program.
- Within three weekdays of the May and November application period, a private school shall notify each applicant and the applicant's parent of his or her acceptance or nonacceptance into the private school.

- Within 10 calendar days of the acceptance notification, the pupil's parent must notify the private school of the pupil's intent to attend the private school. If such notice is not given, the private school may fill the pupil's seat with another choice pupil from the private school's randomly determined choice program waiting list.
- By August 1, instead of September 1, a private school must submit a class list of the choice students accepted at the private school and expected to receive instruction at the beginning of the school term.

The rules also delete the requirement that the pupil assignment council meet to determine a date by which every private school would have an open application period. Under the rules, every private school would have an open application period from May 1 through May 20.

Summary of, and comparison with, existing or proposed federal regulations: None.

Comparison with rules in adjacent states: None.

Summary of factual data and analytical methodologies:

The department anticipates the program reaching the 15% cap in the 2005-06 school year. Therefore, the prorate process would begin February 1, 2005. The department would like the rule in place as soon as possible in order to provide adequate notice to participating schools and parents.

To determine the prorate method, the department worked with all the participating private schools and interested parties. In an effort to get as much input as possible early on in the process, the department:

- Sent out a survey to all current participating schools in December 2003. Of the 106 private schools surveyed, 25 returned the survey. Of those 25 only 7 provided prorate options. The options provided included: (1) giving preference to schools with a history of success or long tenure, (2) grandfathering current students, (3) first come, first serve, and (4) using mathematical formulas (percentages, ratios, averages, etc.).
- Met with the Assembly Committee on Education Reform in January 2004. Department staff discussed committee concerns with the prorate requirement. Members suggested prorate options including grandfathering provisions and mathematical formulas. Some members appeared interested in considering a method that ensures current choice students could continue to participate in the program.
- Met with people in small group settings. The options discussed with the small groups included: (1) straight prorate (simple mathematical division of number of pupils by number of schools), (2) prorate based on capacity, (3) prorate based on percentage of choice students from prior years, and (4) student-based method with preference given to current students, siblings and kindergarten students.

In summary, the information provided at the above meetings suggested a strong dislike for a straight prorate method. The preferred prorate option appeared to be a method that would give preference to continuing students and their siblings.

The department believes that the prorate method proposed in this rule, based heavily on the input received, is a fair way to implement the prorate requirement under the statute.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report: None.

Anticipated costs incurred by private sector: None.

Effect on small business:

The proposed rules will have no significant economic impact on small businesses, as defined in s. 227.114 (1) (a), Stats.

Agency contact person: (including email and telephone)

Tricia Collins, 608/266-2853, tricia.collins@dpi.state.wi.us.

Place where comments are to be submitted and deadline for submission:

The July 9, 2004 hearing notice provided the deadline and contact for submission of comments. The hearing notice is available at www.dpi.state.wi.us/dpi/dfm/pb/mpcpratehn.html.

A public hearing to consider the proposed rule was conducted by the department on August 4, 2004, in Milwaukee. Persons were asked to register in favor, generally in favor (except for . . .), against, generally against (except for . . .), or for information only.

Milwaukee Hearing, August 4, 2004.

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Basimah Abdullah	Pupil Assoc. Council		X	
Dr. Rene Antrop-Gonzalez	Technical Assistance and Leadership Center		X	
Winda Armstrong	Self		X	
Daniel Aussem Hilda Esteves	St. Joan Antida High School		X	
Roger Baehr	Corpus Christi School		X	
Renee Bartelt	School Choice Wisconsin		X	
Amy Bathke	Divine Savior Holy Angels High School		X	
Cheryl Bledsoe	Greater Holy Temple Christian Academy		X	
Thelma Brooks-Davis			X	
Angel Brown	Messmer Preparatory Catholic School		X	
Mary Brown	Academic Solutions		X	
Terry Brown	St. Anthony School		X	
Betty Clayton	Ceria M. Travis Academy		X	
Benjamin Clemons	Risen Savior Lutheran School	X		
Michael Connor	Messmer Catholic Schools		X	
Abiellyah P. Dafetta	Ceria M. Travis Academy		X	
Donald A. Daugherty, Jr.	School Choice Wisconsin		X	
Pastor James E. DeShazer	Greater Holy Temple Christian Academy		X	
Julia A. Doyle	Children First-Parent support group		X	
Carolyn Ettlie	St. Rafael School		X	
Charles Ewing	Dr. Brenda Noach School		X	
Jerald D. Fair	Milwaukee Multicultural Academy	X		
Carole V. Fernandez	St. Marcus School		X	

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Andy Fleckenstein	Fleck Foundation		X	
Alvaro Garcia-Veldez	Notre Dame Middle School		X	
Debra Gee	Marva Collins Prep		X	
Shaheed A. Ghani	Clara Mohammed School		X	
Danny Goldberg	Self		X	
Robert Gottschalk	Messmer Catholic Schools		X	
Everett Gransberry	Travis Academy		X	
Felice Green	School Choice Wisconsin		X	
Daniel Grego	TALC		X	
Jacque Hagerman	Nazareth Lutheran School		X	
Kenneth L. Hagerman	Nazareth Lutheran School		X	
Justine Hall	Kings Academy Christian School			X
Robert Harvey	Learning Enterprise High School		X	
Tony Higgins	Self		X	
Corey Hoze	Self		X	
Kevin Hughes	Messmer Catholic Schools		X	
Latrece Hughes	Travis Academy		X	
Carol S. Jeske	St. Marcus Lutheran School		X	
Kole Knueppel	Hope Christian Schools		X	
Roger Kramp	Mt. Lebanon Lutheran School		X	
Tracy M. Laster	Young Minds Preparatory School		X	
Philip Levis	Self		X	
Michelle G. Lukacs	Atlas Preparatory Academy		X	
Edna Mathews	Greater Holy Temple Christian Learning Center		X	
Nada McCants	Grays Child Care and Prep School		X	
Travis McGlothian	Ceria M. Travis Academy		X	
Charles Meyer	Agape Center of Academic Excellence		X	
Jeff Monday	Messmer Catholic School		X	
SaRai Nance	SaRai and Zigler Upper Excelled Academy		X	
Thomas K. Phillipson	We Can Parents' Network		X	
Denise Pitchford	CEO Leadership Academy		X	
David Prothero	Archdiocese of Milwaukee		X	
Robert Rauh	Self		X	
Amit Ray	Milwaukee Multicultural Academy		X	
Dan Quesnell	Marquette University High School		X	
Michael W. Van Wagenen	Reilly, Penner, & Benton, LLP CPA		X	
Judd Schemmel	Wisconsin Counsel of Religious and Independent Schools		X	
Donna Schmidt	Prince of Peace School		X	
Abigail Schumwinger	School Choice Wisconsin/TALC		X	
Barbara Sella	Wisconsin Catholic Conference			X
Ronald Shaheed	Clara Mohammed School		X	

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Dorothy Smith	Self		X	
LaVora L. Smith	Travis Academy	X		
Robert Smith	Self		X	
Ceasas Stiusion	Milwaukee Public Schools			X
Sherry Street	Self		X	
India Renee Thomas	Agape Center of Academic Excellence			X
Devon R. Turner	MMAC		X	
Tanya Whitaker	Agape Center of Academic Excellence			X
Ruby L. Wiley	Ceria M. Travis Academy		X	
Clara M. Wright	Noah's Ark Preparatory School		X	
Clifford Zigler	SaRai and Zigler Upper Excelled Academy		X	
Cydney Zollicoffer	Excel Academy		X	

The following persons submitted written testimony:

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Daniel Grego	See above			
Donald A. Daugherty, Jr.	See above			
Barbara Sella	See above			
Judd Schemmel	See above			

Summary of public comments and the agency's response to those comments:

Although the registration of testimony above seems to indicate opposition to the rule, a majority of the testimony opposed the 15% cap established in statute. Testimony related to the rule included: (1) lack of statutory authority, (2) the timing of the application process, and (3) the re-allotment of unused spaces.

Changes made as a result of oral or written testimony:

The department believes it has the statutory authority to implement this proposed prorated plan. The final rules have been modified to address points two and three above. In response to concerns raised at the public hearing, the final rules shorten the application process so schools will know sooner which students will be attending their schools. In addition, the final rule includes a two application processes to reallocate unused spaces. Finally, the rule deletes two reporting requirements.

Changes to the analysis or the fiscal estimate:

The fiscal estimate has not been modified.

Responses to Clearinghouse Report:

1. Statutory Authority:

a. As suggested, the final rule has been modified to reference s. 121.004(5), Stats., for the definition of membership.

b. 1. The department does not believe the rule limits who may apply to the choice program. Under the rule, any pupil may apply to any participating school to determine whether or not they are eligible for the program from February through March and again from August through September.

b. 2. As suggested, the final rule has been modified to eliminate preference for 4-year old and 5-year old kindergarten students.

b. 3. The department believes the rule does provide for an allowable method to prorate the number of seats available in the program. As the department has previously stated, there are many options for prorating seats. The statute provides no specific language on how the proration of seats should be completed. However, the department has always had general rule-making authority under s. 227.11 (2) (a), Stats. Further, under 2003 Act 155, the department has the specific authority to promulgate rules to implement and administer the entire program. The department believes its process of providing choices to the parents is not arbitrary but rather is reasonable and is wholly within the intent and purposes of the law.

Further, the department believes a court would give the agency deference in its implementation of this requirement given that the department has administered the program with rules for the last 14 years. For a number of years, the department has determined not to prorate seats even though the estimated number of spaces available as reported by schools exceeded the statutory cap. Rather the department correctly estimated that even though schools reported estimated spaces exceeding the cap, actual program enrollment would remain below the limit. Members of the Legislature are aware of the department's interpretation of this requirement and have not directed the department to prorate seats as if to suggest the agency was not in compliance. The department believes a court would look to the department's expertise in this area and its consistent administration of the cap when determining whether the department has the authority to implement this rule.

b. 4. The proposed rule does not assign a specific number of choice seats to each participating private school. Rather as suggested by participating schools and certain legislators, schools would be allowed to take as many students as they have space up to the overall program limit. As under current law, schools would determine the number of spaces they will have available by grade level. If more students apply than are spaces available, the school would conduct a random selection and establish a randomly determined waiting list. As described above, the market will determine the number of spaces available and children and parents can find and apply to a school and be accepted in any one that has space. When the spaces are filled, the waiting lists begin. If there is a supervening notion to the MPCP it is the policy of "choice." "Spaces" do not exercise choice, parents and pupils do. The constitutional analysis upholding the validity of the program emphasized the "numerous private choices of the individual parents . . ." Jackson v. Benson, 218 Wis 2d 835, 871-872, 578 N.W.2d 602 (1998).

b. 5. The rule was modified to retain current law preference provisions.

c. The department agrees that the proposed timeline for notifying students of acceptance is less than the maximum allowed under statute. The department further notes, that the statutory provision for notification is a maximum not a minimum number of days. The shorter timeline was incorporated into the rule at the request of schools and others to shorten the application process so that schools would know sooner which students would be attending their schools.

2. Form, Style and Placement in Administrative Code:

a. Recommendation accepted, the analysis has been modified.

b. Recommendation accepted, changes made.

c. The sections referenced have been re-written and no longer refer to "4-year-old" or "5-year-old."

5. Clarity, Grammar, Punctuation and Plainness:

a. Recommendation accepted, changes made.

b. As suggested, the final rule has been modified to eliminate preference for 4-year old and 5-year old kindergarten students.

c. Recommendation accepted. Section PI 35.04 (2) is renumbered s. PI 35.04 (1m) and "program" has been changed to "choice program."

d. Recommendation accepted. Under s. PI 35.04 (1) (a) 4. and (4) (a), the reference to "parent or guardian" has been changed to "parent."

e. Recommendation accepted, changes made.

f. Because record retention requirements under ss. 19.21 (6) and 118.125 (3), Stats., apply to public school districts and not private schools, it is difficult to specify a time period in rule. Therefore, a note has been added to specify "In case of a dispute, the department will look to the private school to have preserved all records necessary to demonstrate how it properly applied the statutory requirements under s. 119.23, Stats., and this chapter."

g. Recommendations accepted, changes made.

h. Recommendation accepted, changes made.

i. Recommendation accepted. The word "participating" has been eliminated.

j. The rules have been clarified to direct private schools to fill any open seats after the application period from the school's randomly determined waiting list. The department believes the school should given the authority to decide if it wishes to fill an empty seat with a student, choice or tuition paying. As under current practice, schools will continue to sign a random selection agreement in which they agree to accept choice students on a random basis. Discrimination during the admission process would be a violation of that agreement and s. 119.23, (3) (a) Stats.

k. Under s. PI 35.04 (4) (b), the reference to filling the seat with another choice pupil on the waiting list has been modified to refer to another choice pupil "from the private school's randomly selected choice program waiting list, determined under s. PI 35.03 (1) (a), . . ."

l. Section PI 35.04 (5), has been modified to clarify the class list must be submitted to the department.

m. Recommendation accepted, changes made.

FINAL REGULATORY FLEXIBILITY ANALYSES

Summary of Final Regulatory Flexibility Analysis:

The proposed rules will have no significant economic impact on small businesses, as defined in s. 227.114(1)(a), Stats.

Summary of Comments:

No comments were reported.

NOTICE OF RULES IN FINAL DRAFT FORM

NOTICE IS HEREBY GIVEN To the presiding officers of each house of the legislature that the proposed rules are in final draft form according to the procedure set forth in s. 227.19, Stats.

PROPOSED ORDER OF THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION AMENDING RULES

The state superintendent of public instruction hereby proposes to repeal PI 35.025, PI 35.03 (1) (d), PI 35.04 (2) and PI 35.04 (6) (c); renumber and amend PI 35.04 (1); amend PI 35.03 (1) (a), PI 35.04 (3) (intro.), PI 35.04 (4), PI 35.04 (4m) and PI 35.04 (5); and create PI 35.02 (2m), PI 35.04 (1) and PI 35.05 (10), relating to prorating under the Milwaukee Parental Choice Program.

ANALYSIS BY THE DEPARTMENT OF PUBLIC INSTRUCTION

Statute interpreted: s. 119.23 (2) (b), Stats.

Statutory authority: ss. 119.23 (2) (b) and (11) and 227.11 (2) (a), Stats.

Explanation of agency authority:

Section. 119.23 (2) (b), Stats., requires the department to establish a prorate method for the department to utilize when the number of eligible students applying for the program exceeds the statutory limit. Because the department is interpreting the provisions of this statute and administers/enforces the program governed by it, s. 227.11 (2) (a), Stats., gives the department general rule-making authority.

Section 119.23 (11), Stats., gives the department authority to promulgate rules to implement and administer the entire program.

Related statute or rule: None.

Plain language analysis:

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The rules changed the current admission process by separating it into three parts. The approximate timeline for the process is as follows:

- February through March and, at the private school's option, August through September, a private school must determine a pupil's eligibility to participate in the program.
- Within 14 days of the parents request, but no later than April 5 and, if applicable, October 5, the private school must: (1) notify the parent whether or not the pupil is eligible for the program, and (2) submit to the department a copy of the pupil's application approved by the private school.
- By May 1 and, if applicable by November 1, DPI will conduct a random selection from the pool of pupils reported by participating schools as eligible to participate.

- May 1-20 and, if applicable November 1-20, a private school would accept or place on the school's waiting list choice program pupils notified by the department that they may apply to participate in the program.
- Within three weekdays of the May and November application period, a private school shall notify each applicant and the applicant's parent of his or her acceptance or nonacceptance into the private school.
- Within 10 calendar days of the acceptance notification, the pupil's parent must notify the private school of the pupil's intent to attend the private school. If such notice is not given, the private school may fill the pupil's seat with another choice pupil from the private school's randomly determined choice program waiting list.
- By August 1, instead of September 1, a private school must submit a class list of the choice students accepted at the private school and expected to receive instruction at the beginning of the school term.

The rules also delete the requirement that the pupil assignment council meet to determine a date by which every private school would have an open application period. Under the rules, every private school would have an open application period from May 1 through May 20.

Summary of, and comparison with, existing or proposed federal regulations: None.

Comparison with rules in adjacent states: None.

Summary of factual data and analytical methodologies:

The department anticipates the program reaching the 15% cap in the 2005-06 school year. Therefore, the prorate process would begin February 1, 2005. The department would like the rule in place as soon as possible in order to provide adequate notice to participating schools and parents.

To determine the prorate method, the department worked with all the participating private schools and interested parties. In an effort to get as much input as possible early on in the process, the department:

- Sent out a survey to all current participating schools in December 2003. Of the 106 private schools surveyed, 25 returned the survey. Of those 25 only 7 provided prorate options. The options provided included: (1) giving preference to schools with a history of success or long tenure, (2) grandfathering current students, (3) first come, first serve, and (4) using mathematical formulas (percentages, ratios, averages, etc.).
- Met with the Assembly Committee on Education Reform in January 2004. Department staff discussed committee concerns with the prorate requirement. Members suggested prorate options including grandfathering provisions and mathematical formulas. Some members appeared interested in considering a method that ensures current choice students could continue to participate in the program.
- Met with people in small group settings. The options discussed with the small groups included: (1) straight prorate (simple mathematical division of number of pupils by number of schools), (2) prorate based on capacity, (3) prorate based on percentage of choice students from prior years, and (4) student-based method with preference given to current students, siblings and kindergarten students.

In summary, the information provided at the above meetings suggested a strong dislike for a straight prorate method. The preferred prorate option appeared to be a method that would give preference to continuing students and their siblings.

The department believes that the prorate method proposed in this rule, based heavily on the input received, is a fair way to implement the prorate requirement under the statute.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report: None.

Anticipated costs incurred by private sector: None.

Effect on small business:

The proposed rules will have no significant economic impact on small businesses, as defined in s. 227.114 (1) (a), Stats.

Agency contact person: (including email and telephone)

Tricia Collins, 608/266-2853, tricia.collins@dpi.state.wi.us.

Place where comments are to be submitted and deadline for submission:

The July 9, 2004 hearing notice provided the deadline and contact for submission of comments. The hearing notice is available at www.dpi.state.wi.us/dpi/dfm/pb/mpcpratehn.html.

SECTION 1. PI 35.02 (20m) is created to read:

PI 35.02 (20m) "Sibling" means a brother or sister who shares at least one parent by birth or adoption and by his or her parents' current marriage.

SECTION 2. PI 35.025 is repealed.

SECTION 3. PI 35.03 (1) (a) is amended to read:

PI 35.03 (1) (a) The private school's method for ensuring that, except for continuing pupils in the choice program at that private school and their siblings, pupils will be accepted on a random selection basis from a new pool of applicants each school year. The random drawing shall continue until all available seats are filled and a waiting list order is determined. Waiting lists ~~from previous school years~~ may not be carried over and used ~~from one year to the next~~ after the next succeeding 3rd Friday in September and 2nd Friday in January.

SECTION 4. PI 35.04 (1) is renumbered PI 35.04 (1m) and is amended to read:

PI 35.04 (1m) A From May 1 through May 20, a private school that participates in the Milwaukee parental choice program shall accept pupils notified as randomly selected by the department under sub. (1) (b) on a random basis in accordance with the method submitted under s. PI 35.03 (1) (a) and approved under s. PI 35.05 (5). From November 1 through November 20, a private school that participates in the choice program may accept pupils notified as randomly selected by the department under sub. (1) (b) on a random basis in accordance with the method submitted under s. PI 35.03 (1) (a) and approved under s. PI 35.05 (5). A private school may give preference under this subsection to siblings of pupils already enrolled in or accepted into the choice program ~~at the private school.~~

SECTION 5. PI 35.04 (1) is created to read:

PI 35.04 (1) (a) *Pupil eligibility determination.* 1. Not earlier than the first weekday in February and not later than the last weekday in March, a private school that has met the requirements in sub. (3) shall determine, upon receipt of a choice program pupil application, whether a pupil is eligible for the choice program as prescribed under s. 119.23 (2) (a) 1. and 2., Stats. Not earlier than the first weekday in August and not later than the last weekday in September, a private school that has met the requirements in sub. (3) shall, if applicable, determine upon receipt of a choice program pupil application, whether a pupil is eligible for the choice program as prescribed under s. 119.23 (2) (a) 1. and 2., Stats.

2. Within 14 days of receipt of a pupil application but no later than April 5 and, if applicable, October 5, a private school shall notify, in writing, each pupil's parent of whether the pupil is eligible or ineligible for the choice program as determined under subd. 4.

3. Within 14 days of receipt of a pupil application or notification under par. (b) 2. but no later than April 5 and, if applicable, October 5, a private school shall submit to the department a copy of the pupil application the private school received and approved as eligible under subd. 4.

4. The private school shall ensure the submitted pupil application is complete, accurate and signed by the parent and the school administrator or his or her designee as proof of program eligibility required under s. 119.23 (2) (a) 1. and 2., Stats. The private school shall retain all documents used in verifying pupil eligibility. The pupil application shall be provided by the department.

NOTE: The MPCP pupil application may be obtained from the Wisconsin Department of Public Instruction's website at www.dpi.state.wi.us/dpi/dfm/sms/forms.html or is available at no charge by writing to the Wisconsin Department of Public Instruction, School Management Services, P.O. Box 7841, Madison, WI 53707-7841.

NOTE: In case of a dispute, the department will look to the private school to have preserved all records necessary to demonstrate how it properly applied the statutory requirements under s. 119.23, Stats., and this chapter.

(b) *Program wide notification and random selection.* 1. If fewer pupils are determined eligible for the choice program under par. (a) than allowed under s. 119.23 (2) (b), Stats., the department shall notify, no later than May 1 and November 1, the parents of all eligible pupils reported under par. (a) 3. that they may apply at a participating private school according to the procedures under sub. (1m).

2. If more pupils are determined eligible for the choice program under par. (a) than allowed under s. 119.23 (2) (b), Stats., the department shall conduct a random selection of all eligible pupils reported under par. (a) 3. The random drawing shall continue until the maximum number of pupils allowed to participate in the program under s. 119.23 (2) (b), Stats., is reached and a waiting list order is determined. The department shall give preference in its random selection to continuing pupils in the choice program and siblings of continuing pupils in the choice program. No later than May 1 and no later than November 1, the department shall notify, in writing, the pupils' parents of the results of the random selection. During the October random selection, the department shall give first preference to eligible pupils from the April random selection that did not participate in the choice program at a private school on or before the preceding 3rd Friday in September. In order to receive preference, the pupil's parents shall notify a participating private school not earlier than the first weekday in August and not later than the last weekday in September that the pupil was determined eligible for the program in the random selection conducted by the department in April. Pupils randomly selected may apply at participating private schools according to the procedures under sub. (1m).

SECTION 6. PI 35.04 (4) is amended to read:

PI 35.04 (4) (a) A private school under this section shall notify each applicant and the applicant's parent or guardian of acceptance or nonacceptance, in writing, ~~within 60 days after receiving the application~~ within three weekdays of May 20 and, if applicable, within three weekdays of November 20. The private school shall retain all notices given

under this section, and all original applications, both accepted and nonaccepted, submitted under this chapter. The private school shall submit, with the continuing eligibility report under s. PI 35.03 (5) (b), the number of accepted and nonaccepted applications for the choice program for that school year.

(b) If a pupil is accepted at a private school under this section, the pupil's parent shall notify the private school within 10 calendar days of the mailing of notification of the pupil's intent to attend the private school. If a parent fails to notify the private school within 10 calendar days of the pupil's intent to attend that private school in the school year, the school may fill the pupil's seat with another choice pupil from the private school's randomly selected choice program waiting list, determined under s. PI 35.03 (1) (a), prior to the next succeeding 3rd Friday in September or 2nd Friday in January.

SECTION 7. PI 35.04 (4m) is repealed.

SECTION 8. PI 35.04 (5) is amended to read:

PI 35.04 (5) Annually, by ~~September~~ August 1, a private school under this section shall ~~do all of the following:~~

~~(a) Submit to the department a copy of the accepted applications it received during August. The private school shall ensure the submitted applications are complete, accurate and signed by the parent or guardian and the school administrator or his or her designee as proof of enrollment required under s. 119.23 (4), Stats.~~

~~(b) Submit~~ submit a class list to the department of the choice program pupils, alphabetically by last name, and separated by grade level, ~~that corresponds to the accepted applications submitted under sub. (4m) and par. (a)~~ accepted at the private school and expected to receive instruction at the beginning of the school term.

SECTION 9. PI 35.04 (6) (c) is repealed.

SECTION 10. PI 35.05 (10) is created to read:

PI 35.05 (10) In accordance with s. 119.23 (2) (b), Stats., the state superintendent shall, by April 15, calculate the limit for pupil participation in the program for the succeeding school year. For purposes of calculating the limit for pupil participation, the department shall use the school district's audited membership as defined under s. 121.004 (5), Stats., from the second preceding school year that the choice program limit would be in place.

The proposed rules contained in this order shall take effect on the first day of the month commencing after the date of publication in the Wisconsin Administrative Register, as provided in s. 227.22(2)(intro.), Stats.

Dated this ____ day of August, 2004

Elizabeth Burmaster
State Superintendent



LCRC
FORM 2

WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Richard Sweet
Clearinghouse Assistant Director

Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 04-069

AN ORDER to repeal PI 35.025, 35.03 (1) (d) and 35.04 (2) and (6) (c); to renumber and amend PI 35.04 (1); to amend PI 35.03 (1) (a) and 35.04 (3) (intro.), (4), (4m) and (5); and to create PI 35.02 (2m), 35.04 (1) and 35.05 (10), relating to prorating under the Milwaukee parental choice program.

Submitted by **DEPARTMENT OF PUBLIC INSTRUCTION**

06-21-2004 RECEIVED BY LEGISLATIVE COUNCIL.

07-15-2004 REPORT SENT TO AGENCY.

RS:JLK

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES ☒ NO ☐

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES ☒ NO ☐

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES ☐ NO ☒

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES ☐ NO ☒

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES ☒ NO ☐

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES ☐ NO ☒

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES ☐ NO ☒



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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Clearinghouse Director

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CLEARINGHOUSE RULE 04-069

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 2002.]

1. Statutory Authority

a. Section 119.23 (1) (a), Stats., provides that under the Milwaukee Parental Choice Program (MPCP), “‘membership’ has the meaning given in s. 121.004 (5) [Stats.]” Section 121.004 (5), Stats., specifies that, for any school district, membership is the “sum of pupils enrolled as reported under s. 121.05 *and* the summer average daily membership equivalent for classes approved under s. 121.14.” [Emphasis added.] Section 119.23 (2) (b), Stats., then specifies that “[n]o more than 15% of the school district’s *membership* may attend private schools under [the MPCP].” [Emphasis added.] Thus, the statutes limit MPCP participation to no more than 15% of the sum of: (1) enrolled pupils as reported under s. 121.05, Stats.; and (2) the summer average daily membership under s. 121.14, Stats.

In contrast, s. PI 35.05 (10) indicates that for calculating the 15% limit for MPCP participation, the Department of Public Instruction (DPI) must use the audited membership reported under s. 121.05. However, this does not include the summer average daily membership.

b. Section 119.23 (2) (a), Stats., provides that, subject to the limit that no more than 15% of the school district’s membership may attend private schools under the MPCP, pupils who reside in the City of Milwaukee and meet certain income and school status eligibility requirements may attend any private school participating in the MPCP. In addition to specifying the 15% limit, s. 119.23 (2) (b), Stats., provides that if, in any school year, there are more spaces for MPCP pupils available in the MPCP schools than the maximum number of pupils allowed to participate, DPI must “prorate the number of spaces available at each private school.” Under s.

119.23 (3) (a), Stats., a pupil or the pupil's parent or guardian must submit an application to the MPCP school that the pupil wishes to attend, and the school must notify the applicant, in writing, whether the application has been accepted. Under s. 119.23 (3) (a), Stats., the state superintendent is responsible for ensuring that the school determines which pupils to accept on a **random** basis, although the school may (but is not required by statute to) give preference in accepting applications to siblings of pupils who are accepted on a random basis. If the school rejects an applicant because it has too few spaces available, s. 119.23 (3) (b), Stats., provides that the pupil may transfer the application to an MPCP school that has space available.

The proposed rule includes the following features which conflict with this statutory system:

1. The proposed rule creates an extra step in which DPI determines which pupils may apply to participate in the MPCP if more pupils are eligible to participate than the number of pupils who may participate. Specifically, s. PI 35.04 (1) (b) 2. provides that if more pupils are determined eligible than may participate, DPI must conduct a random selection of pupils to determine who may apply under the MPCP, giving preference to pupils in the following order: (a) continuing pupils in the MPCP; (b) siblings of continuing pupils in the MPCP; (c) four-year old kindergarten pupils and their siblings; (d) five-year old kindergarten pupils and their siblings; and (e) all other pupils. Section PI 35.04 (2) permits only pupils selected by DPI to apply to an MPCP school.

In contrast, s. 119.23 (2) and (3), Stats., allows any pupil who meets the statutory eligibility criteria regarding residency, income, and school attendance status to apply to an MPCP school and then apply to a different MPCP school if the school applied to has too few available spaces. DPI does not have statutory authority to limit which pupils may apply to participate in the MPCP.

2. Even if the statutes were interpreted to provide such authority to DPI, the statutory system provides for random selection, with the only exception being the school's option (not DPI's option) of giving preference to applications of siblings selected on a random basis as stated in current s. PI 35.04 (1). There is no statutory authority for giving preference to kindergartners and their siblings in determining who may apply to participate in the MPCP.

3. Section 119.23 (2) (b), Stats., requires DPI to "prorate" the number of spaces available at each MPCP school if there are, in any school year, more spaces for MPCP pupils available in the MPCP schools than the maximum number of pupils allowed to participate. The analysis notes that a "plain read" of the statutes would be "straight prorate." *Black's Law Dictionary* (Abridged, 6th Ed.) defines "prorate" as to "divide, share, or distribute proportionally; to assess or apportion pro-rata." It further defines "pro-rata" as "proportionally; according to a certain rate, percentage, or proportion." If, for example, only 15,000 pupils may attend private schools under the MPCP and if 20,000 spaces were available for MPCP pupils at these schools, a proration of the number of spaces would be 15,000 divided by 20,000 or 75%. In this example, proration would mean that each MPCP school could fill only 75% of its MPCP

spaces with MPCP pupils. The proposed rule does not use this method to prorate the number of spaces.

There appears to be no ambiguity with respect to the term "prorate." However, if a court found that there is ambiguity with respect to the proration requirement, the court would attempt to discern legislative intent. The proration provision was included in 1995 Wisconsin Act 216, a budget adjustment act that followed 1995 Wisconsin Act 27, the 1995-97 Biennial Budget Act. Governor Thompson had proposed the proration requirement for the biennial budget bill that became Act 27. Legislative Fiscal Bureau (LFB) Paper No. 784, prepared for the Joint Committee on Finance in conjunction with the 1995-97 Budget Bill noted that the Governor had proposed: (a) a requirement that a private school notify DPI of its intent to participate in the MPCP and specify the number of MPCP pupils for which the school has space; (b) if the total number of spaces in the private schools were greater than the number of pupils allowed to participate under the MPCP, DPI would prorate the number of available spaces at each participating school; and (3) if a school rejected an applicant due to lack of space, the pupil could transfer the application to another MPCP school that has available space. The LFB document describing Act 27 noted that the budget bill had inadvertently deleted the Governor's proposal to prorate the number of spaces. This provision was then included in the budget adjustment bill, which became Act 216, without further amplification of legislative intent.

4. Although s. 119.23 (2) (b), Stats., requires a proration, the proposed rule does not provide for a proration at all. Rather, ss. PI 35.03 (1) (a) and 35.04 (2) require an MPCP school to give preference in accepting applications to pupils in the following order: (a) continuing pupils in the MPCP at that school; (b) continuing pupils in the MPCP; (c) siblings of continuing pupils in the MPCP at that school; (d) siblings of continuing pupils in the MPCP; (e) four-year-old kindergarten pupils and their siblings; (f) five-year old kindergarten pupils and their siblings; and (g) all other pupils. Creating an order of preference for admission of pupils at schools is not a proration of spaces. Since all pupils are encompassed in the order of preference (given the catch-all of "all other pupils"), all pupils who meet the statutory eligibility criteria should be eligible to attend the school. The proposed rule does not explain how many spaces are allotted to each school, that is, at what number the school must stop accepting pupils and place remaining applicants on a waiting list.

5. Moreover, even if the proposed rule were deemed to be a proration, the order of priority in ss. PI 35.03 (1) (a) and 35.04 (2) is contrary to the statutes which require random selection and permit (but not require) a school to give preference only to siblings of pupils accepted on a random basis.

c. Section 119.23 (3) (a), Stats., provides that within 60 days after receiving an application from a pupil or pupil's parent or guardian, the private school must notify the applicant whether the application has been accepted.

In contrast, s. PI 35.04 (4) (a) requires the private school to notify the applicant of acceptance or nonacceptance by June 5. This will give the school less than the statutorily provided 60 days inasmuch as s. PI 35.04 (1) (b) 1. and 2. would require DPI to notify applicants

no later than May 1 if the pupil has been selected to apply to participate in the MPCP. (This is a further argument that the proposed rule under which DPI would be involved in selecting who may apply to participate in the MPCP is not reflected in the statutes, as discussed in item b. (1), above.)

2. Form, Style and Placement in Administrative Code

a. The analysis does not note that the proposed rule deletes the requirement that the Pupil Assignment Council meet annually by April 15 and make recommendations to the state superintendent on a method for ensuring that pupils are accepted on a random basis. This is an important point which should be noted in the analysis.

b. In s. PI 35.02 (20m), "Siblings" should be changed to "Sibling." Also, a close quotation mark should be inserted following the term being defined.

"Sibling" is defined as meaning a brother or sister who shares at least one parent by birth or adoption. The definition then states that the term "includes" step-siblings who reside in the same household. Because step-siblings are not a subset of the definition of what sibling "means," the word "includes" should be deleted to make clear that the defined term means both things. [See s. 1.01 (7), Manual.] Also, it may be useful to explain what a step-sibling is rather than use a term that is not further defined and may be open to interpretation.

c. In ss. PI 35.03 (1) (a) and 35.04 (1) (b) 2. and (2), "four-year old" and "five-year old" should be changed to "4-year-old" and "5-year-old," respectively. [See s. 1.01 (5), Manual.]

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In the first bulleted point of the summary of factual data and analytical methodology supporting the rule, it appears that the word "rations" should be replaced by the word "ratios."

b. Sections PI 35.03 (1) (a) and 35.04 (2) both list the order of priority a private school must use in accepting applications. If such provisions are retained, it would be preferable to include the list in only one of these sections and provide a cross-reference to it in the other section.

c. In s. PI 35.04 (2), "program" should be changed to the defined term "choice program."

d. In s. PI 35.04 (1) (a) 4. and (4) (a), "parent or guardian" should be changed to the defined term "parent" which, under s. PI 35.02 (14), includes a guardian.

e. In s. PI 35.04 (1) (a) 4., a space should be inserted following "1."

f. Section PI 35.04 (1) (a) 4. and (4) (a) require an MPCP school to retain forms and notices to verify pupil eligibility and notices and applications. This implies permanent retention. Is there any point in time at which such records need no longer be retained?

g. In s. PI 35.04 (1) (b) 1., the comma following "par. (a)" and the comma following "par. (a) 3." should be deleted. In the first sentence of s. PI 35.04 (1) (b) 2., the comma following "par. (a)" should be deleted.

h. In the last sentence of s. PI 35.04 (4) (a), "fore" should be changed to "for."

i. In s. PI 35.04 (4) (b), it is not clear that the word "participating," which is used twice, is necessary.

j. In s. PI 35.04 (4) (b), it is not clear on what basis a school may decide to overlook the parent's failure to notify the school by June 20 that that the pupil will attend in the following school year. The lack of a standard may result in a discriminatory admission policy.

k. In s. PI 35.04 (4) (b), the reference to filling the seat with "another choice pupil" on the waiting list is unclear. Does that refer only to a pupil who attended school under the MPCP in the prior school year? Or does it refer to a pupil who did not do so but is eligible for the MPCP? Or both? This should be clarified.

l. Section PI 35.04 (5) does not specify to whom the class list must be submitted.

m. In s. PI 35.04 (5), "school" should be changed to the defined term "private school."

2005

Date (time)
needed

1/3/05

LRB - 1299,1

PG : WLj :

BILL

Use the appropriate components and routines developed for bills.

AN ACT . . . [generate catalog] *to repeal . . . ; to renumber . . . ; to consolidate and renumber . . . ; to renumber and amend . . . ; to consolidate, renumber and amend . . . ; to amend . . . ; to repeal and recreate . . . ; and to create . . .* of the statutes; **relating to:** *prohibiting the Department of Public Instruction from selecting pupils for the Milwaukee Parental Choice Program on a random basis.*

[NOTE: See section 4.02 (2) (br), Drafting Manual, for specific order of standard phrases.]

Analysis by the Legislative Reference Bureau

If titles are needed in the analysis, in the component bar:

For the main heading, execute: create → anal: → title: → head

For the subheading, execute: create → anal: → title: → sub

For the sub-subheading, execute: create → anal: → title: → sub-sub

For the analysis text, in the component bar:

For the text paragraph, execute: create → anal: → text

attached ✓

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION #.

Section #. 119.23 (2) (b) of the statutes is amended to read:

119.23 (2) (b) No more than 15% of the school district's membership may attend private schools under this section. If in any school year there are more spaces available in the participating private schools than the maximum number of pupils allowed to participate, the department shall prorate the number of spaces available at each participating private school.

History: 1989 a. 336; 1993 a. 16; 1995 a. 27 ss. 4002 to 4009, 9145 (1); 1995 a. 216; 1997 a. 27, 113; 1999 a. 9; 2001 a. 16, 105; 2003 a. 33, 155.

and may not select pupils
for the available spaces on
a random basis

(End)

Analysis

¶ Under current law the number of pupils who may attend a private school under the Milwaukee Parental Choice Program is capped at 15 percent of the enrollment of the

Milwaukee Public Schools (approximately 15,000 there pupils).
① If in any school year there are more ~~available~~ spaces available in the private schools participating in the program than the maximum number of pupils allowed to attend the private schools under the program, the law directs the Department of Public Instruction (DPI) to ^{prorate} prorate the number of spaces available at each participating private school.
②

¶ This bill prohibits DPI from selecting

pupils for the available spaces on a random basis. The bill is introduced as required by s. 227.019 (5) (e), a statute in support of the objection of the Assembly Committee on Education Reform on October 28, 2004, and the objection of the Joint Committee for Review of Administrative Rules on December 16, 2004, to the issuance of Cleaninghouse Rule 04-069 by the DP1 (Not) Department of Public Instruction. The proposed rule directed DP1 to conduct a random selection of ~~all eligible~~ pupils the number of whenever ~~more~~ pupils ~~are~~ determined eligible for the program ~~then~~ exceeded the maximum number of pupils allowed to attend private schools under the program.

Barman, Mike

From: Solie, Denise
Sent: Wednesday, January 12, 2005 3:07 PM
To: Barman, Mike
Cc: Emerson, James
Subject: Request to jacket LRB 1299/1

Mike,

This applies to the Assembly Bill as well. Please jacket 1299/1 as an Assembly JCRAR bill. Thanks.

Denise Kuchta Solie
Committee Clerk, JCRAR
Rep. Mark Gottlieb
(608) 267-2369

-----Original Message-----

From: Emerson, James
Sent: Wednesday, January 12, 2005 2:22 PM
To: Barman, Mike
Cc: Solie, Denise
Subject:



CR 04-069 Report
to the Legisl...

Mike:

Is this what you need to jacket the school choice bill?

Thank you,
Jim Emerson
Senator Grothman's Office